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SUBJECT: SUDAN: DEMARCHE REQUEST ON POTENTIAL ARTICLE 16
SECURITY COUNCIL RESOLUTION

¶1. (U) Posts are instructed to demarche host countries at an appropriate level regarding the United States Government's strong desire not to see an Article 16 resolution tabled in the Security Council that would defer the probable International Criminal Court (ICC) arrest warrant for Sudanese President Omar Hassan al-Bashir. Post may draw from the appropriate objectives and background below in delivering this demarche. Embassies London, Paris, and San Jose please inform host governments we are delivering this demarche in select UNSC capitals.

Objectives for Mexico, Japan, Austria, Croatia, and Turkey

¶2. (SBU) Posts should pursue the following objectives:

-- obtain firm commitments from host countries that they will not support an Article 16 resolution following the likely issuance of an ICC arrest warrant for President Bashir;

-- request that host countries clearly state to the proponents of this resolution they will not support an Article 16 resolution;

-- inform host countries of the United States Government's position that we support the ICC in its pursuit of those who have perpetrated war crimes; it is in our country's interest that the most heinous criminals, like the perpetrators of genocide in Darfur, are held accountable; and we see no reason to support deferral of the indictment of Bashir;

-- relay to host countries that we feel a low-key response from the UN Security Council following the ICC indictment would be the best approach. We do not plan on seeking or supporting any Council statement or action following the announcement of an arrest warrant unless the situation in Sudan escalates out of control.

-- relay to host countries our position that any violence perpetrated against foreign interests, humanitarian aid workers or UNAMID encouraged or permitted by the Government of Sudan after the issuance of an arrest warrant would be wholly unacceptable, and that we believe this message should be clearly communicated to Sudan by all Council members.

-- For Turkey: note we understand Turkey's concerns with the ICC. Underscore that we share some of the same

concerns. Emphasize, however, supporting a deferral resolution would be a vote for impunity in Darfur. Note that if a resolution is tabled and a vote occurs even an abstention would be preferable to a vote for such a resolution, as long as the intent to abstain is made perfectly clear to the proponents of this resolution.

Objectives for Burkina Faso

13. (SBU) Embassy Ouagadougou should pursue the following objectives:

-- obtain from Burkina Faso a commitment to reconsider their position on an Article 16 deferral due to the serious situation and lack of progress on the ground in Darfur;

-- request that Burkina Faso ask the proponents not to bring the resolution to the Council as it will surely fail to garner the nine necessary affirmative votes without a P5 veto to adopt the resolution;

-- inform Burkina Faso of the United States Government's position that we support the ICC in its pursuit of those who have perpetrated war crimes; it is in our country's interest that the most heinous criminals, like the perpetrators of genocide in Darfur, are held accountable; and we see no reason to support deferral of the indictment of Bashir;

-- relay to host country that we feel a muted response from the Council following the ICC indictment would be the best approach. We do not plan on seeking or supporting any Council statement or action following the announcement of an arrest warrant, unless the situation in Sudan escalates out of control.

-- relay to host country our position that any violence perpetrated against foreign interests, humanitarian aid workers or UNAMID encouraged or permitted by the Government of Sudan after the issuance of an arrest warrant would be wholly unacceptable, and we believe this message should be clearly communicated to Sudan by all Council members.

Reporting Deadline

14. (U) Post should demarche host countries and report back to the department by 5pm Eastern Standard Time on Friday, February 13, 2009.

Background

15. (U) Security Council Resolution 1593 (2005) referred the situation in Darfur to the Prosecutor of the ICC. Despite well known U.S. concerns with the ICC, the United States did not veto the resolution (but abstained). The resolution was adopted by the Council 11-0-4 (U.S., Algeria, Brazil, China). The resolution also required Sudan to fully cooperate with the ICC investigation.

16. (U) In July 2008, ICC Chief Prosecutor Luis Moreno-Ocampo applied for an arrest warrant with the ICC's Pre-Trial Chamber (PTC) for Sudanese President Omar Hassan al-Bashir. The indictment application charged Bashir with ten counts of war crimes, three counts of genocide, and five counts of crimes against humanity. The PTC will likely make a decision on the case before the end of the month. We are aware of media reports indicating that an arrest warrant was issued on February 11, 2009, but we have not received confirmation of these reports.

¶17. (SBU) Soon after the arrest warrant application was announced Sudan launched an international campaign to invoke Article 16 of the Rome Statute, which allows the Security Council (via a resolution) to defer for up to one year a case pending in the ICC. Bashir enlisted the support of China, the African Union (AU), the Organization of the Islamic Conference (OIC), and several African and Muslim states in his push for an Article 16 resolution.

¶18. (SBU) So far, no UNSC member has introduced such a resolution in the UNSC. This is most likely because no more than seven Security Council countries have expressed support for an Article 16 deferral. In order for a UNSC resolution to be approved, it must receive at least nine supporting votes with no vetoes by any of the P5. While it is doubtful the proponents of the resolution will obtain the nine necessary votes, we fear if the proponents think they have nine votes they will bring the resolution forward as a political gesture (i.e. that a majority of the Security Council supports the action). Therefore, the USG would like to ensure firm commitments from at least six other UNSC members to oppose or abstain on an Article 16 deferral resolution. The UK, Costa Rica, and France have publicly stated that they oppose a deferral. Mexico and Japan are both members of the ICC and, therefore, are likely to oppose such a deferral. We expect Austria and Croatia to follow the UK and French lead and oppose a deferral. Turkey shares many of our concerns about the ICC and may only be able to abstain on an ICC resolution. Burkina Faso so far supports a deferral but may be open to persuasion.

¶19. (U) Proponents of deferring the ICC case argue the indictment of Bashir could affect stability on the ground in Darfur and scuttle the Comprehensive Peace Agreement (CPA). These fears have been fed by the Government of Sudan's veiled threats to the international community should an arrest warrant be issued for President Bashir (e.g. we cannot guarantee the safety of westerners, all options are on the table, the rebels will use the indictment to create chaos in Darfur). The United States has delivered the message to the GOS that any retaliatory measures against the UN, humanitarian organization, or other westerners would not serve the interests of the GOS and will not be tolerated by the international community. The United States believes that justice and peace are not mutually exclusive. We will continue to insist following a possible issuance of an ICC arrest warrant for President Bashir that the Government of Sudan uphold all their international and national legal obligations, work with the UN-AU negotiator to find a durable peace in Darfur, implement their CPA responsibilities, and to allow uninhibited the full deployment of UNAMID.

¶10. (SBU) In contrast, the U.S., UK, and France argue that a deferral is not warranted. For seven months the Government of Sudan has been aware of the proceedings filed by the ICC's Prosecutor Luis Moreno-Ocampo. During this time the Government of Sudan has done little to indicate that a deferral of the ICC indictment would lead to progress on the Darfur Peace Agreement, improvement in the lives of the Darfuri people, or more rapid implementation of the CPA.

¶11. (SBU) Background on Burkina Faso: As an AU member, Burkina Faso is in a difficult predicament on this issue. However, the U.S. has very much appreciated and admired Burkina Faso's leadership and independent thinking thus far on the Security Council, as demonstrated in its vote for the Zimbabwe Sanctions resolution last year. Burkina Faso knows this issue better than most, due to the exemplary leadership of its former Foreign Minister Djibrille Bassole.

¶12. (U) For further information, please contact Rebecca
Goldenberg (goldenberggra@sgov.gov) or Joseph J. FitzGerald
(fitzgeraldjjo@state.sgov.go at IO/UNP.
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